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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

C2PM, INC., Plaintiff and Appellant, v. KENNETH S. YOUNG, Defendant and Respondent.	A122389 (Alameda County Super. Ct. No. RGO7336780)

Plaintiff and appellant C2PM, Inc. (C2PM) appeals the trial court's order sustaining without leave to amend defendant and respondent Kenneth S. Young's demurrer to C2PM's first amended complaint alleging trade libel and tortious interference with business relations. We affirm.

BACKGROUND

C2PM is an engineering consulting firm that contracts and subcontracts on engineering projects with the California Department of Transportation (Caltrans). On July 20, 2007, C2PM filed the original complaint against Kenneth S. Young (Young) seeking compensatory and punitive damages for defamation and intentional interference with business relations.

In the original complaint, C2PM alleged the following set of facts in support of its causes of action and its claim for punitive damages: "On Thursday, July 21, 2005, four Caltrans staff led by [Young] sign out a Caltrans carpool from the District 4 building in Oakland and drove to the West Approach construction office on Fremont Street in San Francisco. [¶] [Young] met with C2PM staff Mr. Preston Nguyen at his Fremont Street

office. He told Preston that Ali Altaha is bad mouthing Caltrans at the Small Business Council meeting and that it is in Preston Nguyen's best interest to leave C2PM and join any other firm. [Young] told Preston Nguyen that C2PM was not a good company. [¶] On Friday, July 22, 2005, [Young] sent Preston an email from his yahoo.com account from a State Computer terminal showing Preston the 'trend of State contracting firms' web link and told Preston for sensitivity issues to communicate with him on his personal account. [¶] Within a week of July 22, 2005, Ali Altaha complained to Caltrans Director Sartipi about [Young's] behavior. Sartipi forwarded Altaha's complaint to the Department of General Services for investigation. On January 24, 2007, Department of General Services issued a determination after investigation."

Young demurred to the complaint on various grounds. As pertinent here, Young asserted that the complaint should be dismissed because C2PM failed to allege compliance with Government Code section 905.2 (section 905.2).[1] Young asserted that section 905.2 requires the filing of a claim with the State of California Victims Compensation Board prior to filing an action against an employee of the state of California.

In its opposition to Young's demurrer, C2PM contended that it was not required to allege compliance with section 905.2 because it was suing Young in his individual capacity and was not suing the state. In this regard, C2PM asserted that "[t]here was not one allegation made in the entire complaint that defendant was acting in the course and scope of his employment, neither in the caption nor in the body of the complaint, because this action is not intended to be against [Caltrans]."

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[1] Under the Government Claims Act (Gov. Code, § 900 et seq.), a party "must present a timely claim for money or damages to a [] public entity before suing the [] public entity for money or damages, except in specified circumstances that are not relevant here. (§§ 905, 905.2, 915, subd. (a), 945.4.)" *City of Los Angeles v. Superior Court* (2008) 168 Cal.App.4th 422, 427.) "The failure to do so bars the plaintiff from bringing suit against that entity. (§ 945.4.)" (*State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1237.)

In his reply brief, Young noted that although C2PM does not state it in the complaint, his position at the time of the allegations was that of a State of California Senior Transportation Engineer and Contract manager with the Consultant Services Unit. Young also stated in his reply brief that "the complaint contains sufficient language . . . to conclude that the alleged actions occurred within the scope and course of State business." According to Young, this language included the allegations that Young led a group of Caltrans staff from Caltrans offices in Oakland to a meeting with C2PM staff at Caltrans offices in San Francisco in a Caltrans car pool vehicle, and that Ali Altaha filed a complaint with Caltrans Director Sartipi about Young's behavior at the meeting, resulting in an investigation and determination by the Department of General Services, a State agency.

On October 18, 2007, the trial court sustained Young's demurrer with leave to amend "*to allege, if possible, facts demonstrating compliance with the Tort Claims Act, Government Code section 900 et seq.*" In its ruling, the trial court stated that "[t]he allegations in [the] Complaint clearly demonstrate that Defendant is being sued for his actions in the scope of his employment for Caltrans. Therefore, prior to filing this action, [C2PM was] required to file a tort claim with Caltrans" pursuant to the Tort Claims Act."

On October 30, 2007, C2PM filed its first amended complaint (FAC) against Young alleging causes of action for trade libel and tortious interference with business relations. The FAC alleged as follows: "On Thursday, July 21, 2005, [Young] drove to C2PM's West Approach construction office on Fremont Street in San Francisco. [¶] [Young] met with C2PM staff, Mr. Preston Nguyen at C2PM's Fremont Street office. He told Preston, that Ali Altaha, who is the manager of C2PM, is bad mouthing Caltrans at the Small Business Council meeting and that it is in Preston Nguyen's best interest to leave C2PM and join any other firm. [Young] told Preston Nguyen that C2PM was not a good company. [¶] On Friday, July 22, 2005, [Young] sent Preston an email from his yahoo.com account showing Preston the 'trend of State contracting firms' web link and told Preston for sensitivity issues to communicate with him on his personal account. [Young] sent this communication to cause Preston Nguyen to worry about the stability of

C2PM and Mr. Nguyen's future if he stayed with C2PM. [Young] asked to communicate with Mr. Nguyen on his personal account because these communications were outside the scope of Mr. Young's employment at Caltrans. After [Young's] visit, false statements and email, Mr. Nguyen became concerned at C2PM's stability and his future if he stayed with C2PM. These concerns started immediately after Young's visit and remained steady to present date. As a result, C2PM was forced to pay Mr. Nguyen additional money as year end bonuses, totaling $30,000, in order to keep Mr. Nguyen at C2PM. In addition, management at C2PM was required to spend additional time calling and visiting Mr. Nguyen while he was out in the field to keep him comfortable working with C2PM and to mitigate against any additional defamatory statements. This has caused additional expense to C2PM and was made necessary because of Young's defamatory statements about C2PM. Immediately after Young's visit to C2PM and his communication with Mr. Nguyen, Young started a rumor that Ali Altaha, C2PM's manager, had written a letter to the governor, in which Mr. Altaha called the governor names. This was false and aimed at driving business from C2PM. [Young's] rumor had the desired affect. Immediately after Young's visit to Preston, his email, and the rumor about Mr. Altaha's letter calling the governor names, C2PM could not get placed as a subcontractor on any contracts held by large contractors, as it had in the past. Ali Altaha was told by David Cabari, a major consultant in the field, that it was a well known fact that Caltrans was angry at C2PM and that as a result, no major Prime contractor would put C2PM on its team from now on. Jim Adair, an employee at C2PM resigned his employment because of the rumor started by Young. This loss cost C2PM additional resources, which have still not been replaced."

On November 13, 2007, Young filed a demurrer to the FAC. Young requested the trial court sustain his demurrer without leave to amend because C2PM had failed to allege compliance with the Tort Claims Act as required by the trial court's order of October 18, 2007. In its opposition to Young's demurrer, C2PM asserted that it did not allege compliance with the Tort Claims Act because it "is not asserting any cause of action against the State of California or any other public entity." Rather, C2PM asserted

it was not suing Young as a government employee because "[his] actions exposed him to individual liability."

The trial court took the matter under submission after a hearing on December 27, 2008, and issued an order sustaining the demurrer without leave to amend on March 28, 2008. The trial court ruled as follows: "The Court previously granted Plaintiff leave to amend to allege, if possible, facts showing Plaintiff has complied with the Tort Claims Act. Defendant Young is an employee of [Caltrans] and Plaintiff alleges that his alleged misconduct occurred in connection with his employment. [¶] In the [FAC], Plaintiff has made amendments to minimize the fact that Young is employed by Caltrans, though it's still apparent that Plaintiff contends that Plaintiff has been financially damaged because of being in disfavor with the management at Caltrans. [¶] Although the well-pleaded factual allegations should be accepted as true, no matter how improbable, for purposes of a demurrer, the Court is permitted to reject those allegations that are inconsistent with the allegations previously made by a party if the party does not adequately explain the inconsistency. *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 810 and *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384. [¶] In this case, the Court cannot ignore Plaintiff's allegations in the initial Complaint that Defendant Young made disparaging statements about Plaintiff and attempted to undermine Plaintiff's relationship with Plaintiff's employees while in the course and scope of his duties at Caltrans."

Notice of Entry of Order on demurrer was filed on May 7, 2008. Judgment of dismissal was filed on July 3, 2008. C2PM filed a timely notice of appeal on July 15, 2008.

DISCUSSION

In essence, C2PM contends the trial court's order sustaining the demurrer should be reversed because the allegations in the FAC demonstrate that Young's actions were outside the course and scope of his employment with Caltrans, meaning that C2PM was not required to present its claim as required under the Tort Claims Act before filing suit against Young. In this vein, C2PM urges that there is "no evidence" that Young's actions as alleged by C2PM in the FAC "were within the course and scope of his employment."

C2PM also urges that the issue of whether Young was "conducting state business . . . might be best left to be decided by a jury or even in a motion for summary judgment." C2PM's contentions are unpersuasive.

Government Claims Act

Section 950.2 provides in pertinent part that "a cause of action against a public employee or former public employee for injury resulting from an act or omission *in the scope of his employment as a public employee* is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division. . . . This section is applicable even though the public entity is immune from liability for the injury." (§ 950.2 [italics added].) Section 905.2 in Part 3 provides that a claim for money or damages against a state entity "shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910)." (§ 905.2.) Additionally, section 945.4 provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division." (§ 945.4.)

These provisions of the Government Claims Act establish that "a written claim for money or damages for injury [must] be presented to the employing public entity as a prerequisite to suing the agency *or any of its employees* who are claimed to have acted within their official capacity." (*Massa v. Southern Cal. Rapid Transit Dist.* (1996) 43 Cal.App.4th 1217, 1221-1222 [italics added]; accord *Fisher v. Pickens* (1990) 225 Cal.App.3d 708, 718 [claim for damages from a public employee (a court investigator for a possible conservatorship) barred under the Tort Claims Act where plaintiff failed to "submit his claim to the county, defendant's employing public entity"].) Furthermore, "the failure to allege facts demonstrating or excusing compliance with this claim presentation requirement subjects a complaint to a general demurrer." (*Bodde, supra,* 32

Cal.4th at p. 1237; *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 613 ["Failure to allege compliance renders the complaint in such an action subject to general demurrer."].)[2]

Regarding whether an act or omission by a public employee occurred in the scope his or her employment for purposes of section 950.2, "[a]n employee acts within 'the scope of his employment' when he is engaged in work he was employed to perform or when an act is incident to his duty and was performed for the benefit of his employer and not to serve his own purpose. (Citation.) '[T]he proper inquiry is not " 'whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the [employee] which were authorized by the [employer.]' " ' (Citation.) We view 'scope of employment' broadly to include willful and malicious torts as well as negligence. (Citation.) That an employee is not ' "engaged in the ultimate object of his employment" ' at the time of his wrongful act does not necessarily mean the employee acted outside the scope of his employment." (Citation.)" (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750-1751.)

Analysis

The original complaint alleges that Young led three other Caltrans staff in a Caltrans car pool vehicle from Caltrans Bay Area Headquarters to a meeting with C2PM staff at Caltrans offices in San Francisco. At this meeting, according to the allegations in the original complaint, Young told C2PM staff member Preston Nguyen that C2PM was not a good company and next day sent Nguyen an email from a State Computer terminal showing him a web link about State contracting firms. The original complaint also alleges that C2PM's owner, Ali Altaha, complained to the Caltrans director about

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[2] The only exception provided in the Tort Claims Act to the pre-filing requirement for a suit against a public employee is set forth in section 950.4, which states: "A cause of action against a public employee or former public employee is not barred by Section 950.2 if the plaintiff *pleads and proves* that he did not know or have reason to know . . . that the injury was caused by an act or omission of the public entity or by an act or omission of an employee of the public entity in the scope of his employment as a public employee." (§ 950.4.)

Young's behavior. C2PM asserted Young's actions caused injury to its business reputation and to its contractual relationship with Nguyen.

On the basis of these allegations, the trial court ruled in its order sustaining the demurrer to the original complaint that Young "is being sued for his actions in the scope of his employment for Caltrans. Therefore, prior to filing this action, [C2PM was] required to file a tort claim with Caltrans." This ruling reflects the trial court's determination that the original complaint failed "to allege facts demonstrating or excusing compliance with th[e] claim presentation requirement" of section 905.2 and was therefore properly subject to a general demurrer on that basis. (*Bodde, supra,* 32 Cal.4th at p. 1237; see also *Briggs v. Lawrence, supra,* 230 Cal.App.3d at p. 618 [holding that "a client who sues such a public defender for malpractice [must first] file, as a precondition to suit, a Tort Claims Act claim against the employing public agency" in order to "serve the remedial purpose of the claim procedure by giving the entity prompt notice of its employee's asserted failure to provide competent and professional service"].)

Furthermore, the allegations in the FAC did not cure the defect identified by the trial court in the original complaint, namely, C2PM's failure to allege facts demonstrating either compliance, or excusing compliance, with the pre-filing requirement of the Tort Claims Act. Despite the fact that the FAC omits any reference to Young's connection with Caltrans, counsel for C2PM acknowledged during oral argument that Young was at all relevant times a Caltrans employee. As explained below, the allegations set forth in the FAC and C2PM's unequivocal acknowledgment that Young was at all relevant times a Caltrans employee, together support the trial court's finding that the actions C2PM complains of were incident to Young's employment with Caltrans.

As in the original complaint, the FAC alleges Young met with C2PM staff at C2PM's office on Fremont Street. At this meeting, the FAC continues, Young told Preston Nguyen that C2PM's owner had been "bad-mouthing" Caltrans and that "C2PM was not a good company." Nothing in the FAC indicates this meeting was held outside regular office hours. Furthermore, the FAC alleges "no major Prime contractor" would hire C2PM as a subcontractor because "Caltrans was angry at C2PM" on account of false

rumors spread by Young. Thus, the operative facts of the FAC fail to dispel the clear inference that Young's actions and C2PM's alleged injury arise from, and are incidental to, Young's employment with Caltrans. Accordingly, for purposes of the Tort Claims Act, Young was acting within the scope of his employment and C2PM was required to comply with the Act's pre-filing requirements.[3] (Cf. *Fowler v. Howell, supra,* 42 Cal.App.4th at p. 1752-1753 [malicious prosecution action by public employee against co-worker — filed after co-worker falsely accused public employee of inefficiency, sexual harassment and rude behavior — barred by section 950.2 because co-worker was acting within scope of employment]; *Mazzola v. Feinstein* (1984) 154 Cal.App.3d 305, 311 [county supervisor acted with scope of her employment when she made allegedly slanderous statements about striking employees].)

C2PM's counsel's position, as stated at oral argument, is that he omitted from the FAC any reference to Young's connection to Caltrans simply to demonstrate to the trial court that he wanted to sue only Young in his individual capacity, and that he had no desire to sue Caltrans. Counsel's position, however, misapprehends the purpose of the Tort Claims Act and the role of the claim procedures therein. "The purpose of the claim procedure is said to be to give the public entity an opportunity for early investigation and thus to settle just claims before suit, to defend unjust claims, and to correct conditions or practices which gave rise to the claim. (Citations.)" (*Briggs v. Lawrence, supra,* 230 Cal.App.3d at pp. 612-613.) Moreover, because an employee of a public entity who is sued for an act or omission within the scope of his or her employment is entitled to indemnification by the public-entity employer, the Tort Claims Act includes "a requirement that . . . one who sues a public employee on the basis of acts or omissions in the scope of the defendant's employment have filed a claim against the *public-entity employer* pursuant to the procedure for claims against public entities. (Citations.)"

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[3] Nor do the allegations of the FAC show C2PM is entitled to the exception to the pre-filing requirement set forth in section 950.4 because they do not prove that C2PM "did not know or have reason to know . . . that the injury was caused . . . by an act or omission of an employee of the public entity in the scope of his employment as a public employee." (§ 950.4.)

(*Ibid.*) Thus, when the trial court granted Young's demurrer to the original complaint with leave to amend, it was incumbent upon C2PM to demonstrate unambiguously that it had complied with, or was excused from compliance with, the Tort Claims Act: C2PM may not escape this obligation by simply omitting pertinent facts from the FAC.

In sum, the allegations set forth in the FAC do not establish Young was acting outside the scope of his employment. Accordingly, the trial court did not err by granting Young's demurrer to the FAC without leave to amend.

DISPOSITION

The Judgment of Dismissal entered in favor of defendant Young is affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.